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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1970

No. 1023

JOHN and EDWARD HEALY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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Respondent.

PETITION FOR CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioners, JOHN HEALY and EDWARD HEALY, pray that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the Circuit Court of Cook County, County Department, Criminal Division sustaining the motion to quash the search warrant and suppressing the evidence seized pursuant thereto was entered without written opinion.

The State appealed.

The Appellate Court of Illinois, First District reversed that order in an opinion filed on June 4, 1970, which opinion is set forth herein as Appendix A, 261 N.E. 2d. 468.

The Supreme Court of Illinois, without opinion, denied leave to appeal on October 5, 1970.

JURISDICTION

Leave to appeal was denied on October 5, 1970, by the Illinois Supreme Court. This Petition is filed within 90 days, as provided under 28 U.S.C. Section 1257(3)[1].

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1. The instant petition for certiorari involves motions to quash a search warrant and to suppress evidence, which motions were sustained by the trial court because he found that perjury existed in the affidavit for the search warrant; the Appellate Court of Illinois, First District, reversed the order of the trial court and remanded the cause on the ground that the trial court had no right to determine that perjury existed; the Supreme Court of Illinois denied Leave to Appeal. We fully recognize that Section 1257 requires a "final judgment or decree." But if this cause is first remanded to the trial court, the State will prosecute and obtain a conviction predicated upon the knowing use of perjury, and the cause will then "once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by appeal to this Court, but it would all result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. The language of § 1257 . . . does not require a result leading to such consequences." [Mr. Justice Black speaking for a unanimous Court in *Mills* v. *State of Alabama,* 384 U.S. 214, 217-218].

QUESTIONS PRESENTED

1. Whether a trial court can, on motion by a defendant, determine the truth or falsity of the allegations in a complaint for a search warrant?

2. May probable cause be based upon perjured testimony; that is, may perjured testimony be shielded from the constitutional requirement of due process and thereby be the basis for a conviction by the incorporation of such testimony into an affidavit for a search warrant sworn to in an *ex parte* proceeding?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

A police officer swore in an affidavit for a search warrant that an informer had told him on June 29, 1966 that:

> "he was in the described premises . . . at which time he was shown a quantity of jewelry . . . by Edward Healy, who stated to informant that property was stolen from a jewelry salesman in Lincoln, Illinois on 28 June 1966. Above described property was offered for sale to informant who stated he would let subject Edward Healy know."

Prior to trial, the defendant moved to quash the search warrant alleging that the affiant, Detective Lopez, had committed perjury in his affidavit, and denying the material allegations in that affidavit.

The trial court found the affidavit to be fraudulent and perjured; that there was no informant at all, and quashed the search warrant.

The State appealed to the Appellate Court of Illinois, First District, which court, relying upon *People* v. *Bak*, 45 Ill. 2d. 140, and *People* v. *Mitchell*, 45 Ill. 2d. 148 (both cases now pending on *certiorari*, docket Nos. 296 and 304) reversed in an opinion cited herein as Appendix A.

The *Bak* and *Mitchell* opinions are cited herein as Appendix E and Appendix F, respectively.

REASONS FOR GRANTING THE WRIT

THERE IS A GRAVE CONFLICT IN VARIOUS JURISDICTIONS, BOTH STATE AND FEDERAL, AS TO WHETHER AN AFFIDAVIT FOR A SEARCH WARRANT MAY BE ATTACKED ON THE BASIS OF FRAUD.

THE OPINION IN THIS CASE JUDICIALLY APPROVES THE USE OF PERJURED AFFIDAVITS FOR SEARCH WARRANTS.

A search warrant was issued in an *ex parte* hearing, only the police officer being present before the court. In due course, an indictment for burglary was instituted against petitioners before a different judge based upon evidence seized pursuant to the search warrant. Petitioners filed a motion to suppress, asserting that the police officer, who swore to the affidavit, committed perjury.

The trial court in sustaining the motion to suppress, held that the "testimony of the police officer" contained in the affidavit was not only incorrect, but perjured. He stated:

> "I concluded, from what was put on the record in that case, that the motions of the defendants were well taken. And I was convinced, that there was no informant, that there never was; and if I was to spec-

> ulate as to who the informant was, I could very well speculate it was an illegal informant, if there was one, such an informant that has been outlawed in the State."

This is a finding of perjury by the affiant police officer.

The Appellate Court of Illinois held it was improper for the trial court to determine that the police officer committed perjury. That holding is *contra* to prior decisions of this court.

A State may not knowingly use perjured testimony to obtain a conviction. *Napue* v. *Illinois,* 360 U.S. 264, 3 Led 2d 1217; *Alcorta* v. *Texas,* 355 U.S. 28, 2 Led 2d 9; *Mesarosh* v. *United States,* 352 U.S. 1, 1 Led 2d 1.

The constitutional abhorrance to a conviction based upon perjury is not diluted by incorporating the perjury into an affidavit for a search warrant. Nor is the taint of perjury diluted because existence of the perjury is demonstrated before a different judicial officer than the magistrate who issued the warrant.

> " 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth' " (*Napue* v. *Illinois,* 360 U.S. 264, 270, quoting from *People* v. *Savvides,* 1 N.Y. 2d. 554, 557).

Warrants are required to insure, prior to intrusion into a citizen's house, a determination by an objective judicial officer, *Aguilar* v. *Texas,* 378 U.S. 108. This is a shield to protect citizens against overzealous police officers. To permit the instant conviction to stand is in total contradiction of the purpose of the warrant requirement.

For, in the instant case, the warrant proceedure has been converted into a sword, by which perjury is shielded, thereby permitting an invasion into a citizen's house upon evidence which would never approach the Constitutional requirements of the 4th and 14th Amendments.

To save time, and with leave of this Honorable Court, we adopt in its entirety the Argument made for certiorari in *People* v. *Bak* (docket No. 296) and *People* v. *Mitchell* (docket No. 304) including the citations therein.

In fact, the instant case is cited as "Appendix D" to the petition for certiorari filed in *People* v. *Mitchell,* No. 304.

With deference, in Illinois the citizenry simply have no enforceable "right to be secure in their persons, houses, papers and effects from unreasonable searches and seizures. . . ."

A compilation of recent holdings culminating in the case *sub judice* evinces the *coup de grace.*

An Illinois Statute (Ill. Rev. Stat. 1969, Ch. 38, Section 108-4) permits the police to obtain and execute thousands of search warrants, yet only docket *in court* those that they wish so to do. The courts never learn of the rest; and this statute has just been held constitutional (*People* v. *Price,* —— Ill. 2d ——, No. 41567, Appendix B, decided September 30, 1970).

In *People* v. *Bak* and *People* v. *Mitchell,* the Illinois Supreme Court *originally* held that the factual allegations in a complaint for search warrant could be contested (see Appendix C and D).

And it did so in no uncertain terms:

> ". . . It follows logically that a factual showing sufficient to support a finding of probable cause by a

> magistrate must be a truthful showing. To hold otherwise would be incongruous, for untruths are not facts. To deny defendant the right to disclose perjury or misrepresentation would not only deprive him of his constitutional right but in effect it would make a mockery of the very procedure established to protect that right (*People* v. *Bak, original* opinion, Appendix C, pp. 3).

But the composition of the Illinois Supreme Court changed before Rehearing, and the court then held, over vigorous dissents by Justices Schaefer and Ward, that no such attack could be maintained (Appendix E and F, 258 N.E. 2d 341, and 258 N.E. 2d 345).

The new majority reasoned that the citizen was afforded sufficient protection because

> "Should an affiant betray the confidence in his integrity which is contemplated by the *ex parte* proceeding and intentionally make misrepresentations to the judicial officer, (issuing the warrant) he can be punished for the offense" (*People* v. *Bak,* 258 N.E. 2d 341, 343).

The printer's ink was hardly dry before the Supreme Court of Illinois showed its contempt for its own reasoning (and that of *People ex rel Pugh* v. *Pate,* 401 F. 2d 6, 7 Cir., 1968) by holding that an affidavit for a search warrant may be "attested" by one signing a fictitious signature and that "affiant" cannot be identified (*People* v. *O'Kiersey,* —— Ill. 2d ——, 41438, decided September 30, 1970, Appendix G). How can a fictitious unidentifiable "affiant" be prosecuted for perjury?

And then came the case at bar.

Here the trial judge made a specific finding of fraud! And perjury! And that there was no informer at all! And he *sustained* the motion to quash the search warrant!

But the People appealed, and the Appellate Court of Illinois, relying on *People* v. *Bak,* 45 Ill. 2d 160, and *People* v. *Mitchell,* 45 Ill. 2d 148, held that the trial court had no right to question the integrity of the affiant or his affidavit (Appendix A).

The cumulative effect of these decisions is readily apparent. The police may conduct an unlimited number of searches (filing only those search warrants they wish) "attested" by fictitious signatures (so no one is subjected to possible perjury prosecution) and no one—not even the trial judge—can litigate the truthfulness of the "Oath or affirmation."

No wonder Justice Schaefer, dissenting in *People* v. *Mitchell,* 258 N.E. 2d 345, 349, says that our Constitution has been so "diluted" by the new *Bak* and *Mitchell* decisions as to "no longer afford protection against the operation of Hitler type government."

CONCLUSION

Unlike any case which we can find in Anglo-American jurisprudence, the judiciary has here stamped its approval upon the use of perjury. No such opinion should be allowed to stand.

For these reasons, a Writ of Certiorari should issue to reverse the judgment and opinion of the Appellate Court of Illinois, First District.

Respectfully submitted,

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APPENDIX A

No. 53135 People of the State of Illinois, *Plaintiff-Appellant,* v. John Healy and Edward Healy, *Defendants-Appellees.*	Appeal from the Circuit Court of Cook County. Hon. L. Sheldon Brown, Presiding.

MR. JUSTICE MCNAMARA DELIVERED THE OPINION OF THE COURT.

This is an appeal by the State from an order of the Circuit Court quashing a search warrant and suppressing evidence seized pursuant to that warrant. The warrant issued by a magistrate commanded the search of the persons of the two defendants and of certain described premises located at 8247 North Odell Avenue, Niles, Illinois. The warrant also ordered the seizure of three jewelry cases containing specifically described jewelry.

The search warrant was issued on the basis of an affidavit made by a police officer. The affidavit recited that on the same date the affiant met with a confidential reliable informant who had furnished him with information in the past which had resulted in arrest and convictions. The affidavit went on to recite that the informant had told affiant that he was on the above described premises on the same date and that Edward Healy had shown him the jewelry referred to above. The affidavit further recited that Healy had told the informant that the jewelry was stolen from a jewelry salesman on the preceding day; and that the jewelry in question had been offered for sale to

informant who said that he would let Healy know at a later time. The affidavit also recited that the police department was advised that a theft of jewelry had occurred in Lincoln, Illinois on the preceding day and that jewelry in the value of $23,000 had been stolen from Ray Cruze.

The warrant was executed on the following day, and various items of jewelry belonging to Cruze were recovered. Defendants were then indicted for theft of the property of Cruze. Thereafter defendants filed a motion to quash the search warrant and to suppress the evidence, alleging among other points that there was in fact no informant and that the police officer had committed perjury in making the affidavit in support of the search warrant. The motion made by defendants also requested that the informant be produced for an in camera hearing outside the presence of defendants.

After conferences in chambers with defense counsel and the Assistant State's Attorney, the trial judge stated that he was convinced that there was no informant, and he demanded that the informant and the police officer be produced for an in camera hearing. When the State refused to do so, the trial court entered an order quashing the search warrant and suppressing the evidence. The State appeals, contending that defendants had no right to look behind the search warrant and thus challenge the matters stated under oath which led to the finding of probable cause and the issuance of a search warrant by the magistrate.

In a recent decision, *People* v. *Bak*, —— Ill. 2d ——, Gen. Nos. 41151, 51315 (1970), our Supreme Court was faced with precisely the same question, and their holding is dispositive of the issue in the instant case. In that case, the court held that the issuance of a search warrant repre-

sented a conclusive judicial finding of the existence of probable cause and that any subsequent hearing must be limited to an examination of the face of the complaint and warrant. In so holding, the court stated:

> "The majority of this court believes that both constitutions contemplate only that a judicial officer find probable cause for the issuance of a warrant based on the evidence under oath that has been presented to him by the one requesting the warrant. It is contemplated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence."

Thus under the holding in *Bak,* we find that the trial court erred in permitting defendants to look behind the search warrant which was valid on its face and in allowing them to challenge the truthfulness of the allegations of fact on which the warrant was issued.

The order of the Circuit Court quashing the search warrant and suppressing the evidence is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ORDER REVERSED AND
CAUSE REMANDED.

Dempsey, *P.J.*, and Schwartz, *J.*, concur.

APPENDIX B

Docket No. 41567—Agenda 4—May, 1970.

The People of the State of Illinois, Appellee, vs.

Walter Price, Appellant.

Mr. JUSTICE KLUCZYNSKI delivered the opinion of the court:

On December 26, 1966, pursuant to a search warrant, Detectives Campbell and Crosby of the Chicago Police Department searched the apartment of the defendant, Walter Price and seized measuring spoons with traces of heroin and two marijuana cigarettes. They also found on the person of the defendant a hypodermic needle and syringe. After the arrest Detective Campbell submitted the search warrant and the complaint for the warrant through regular channels to narcotics court.

Defendant's motion to quash the search warrant and to suppress evidence was denied, and he was found guilty in a bench trial of possession of marijuana and sentenced to a term of from one to three years. He appeals directly to this court alleging: (1) that section 108—4 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, ch. 38, par. 108—4) is unconstitutional; (2) that a search warrant issued pursuant to an affidavit signed with a fictitious name is void; and (3) that the search warrant should have been quashed because the allegations in support thereof were specifically denied.

Defendant contends that section 108—4 violates the fourth and fourteenth amendments to the United States constitution because it allows unsupervised police intrusion upon a citizen and his home. Section 108—4 provides: "All warrants shall state the time and date of issuance

and be the warrants of the Judge issuing the same and not the warrants of the court in which he is then sitting and such warrants need not bear the seal of the court or clerk thereof. The complaint on which the warrant is issued need not be filed with the clerk of the court nor with the court if there is no clerk until the warrant has been executed or has been returned 'not executed.'"

At the hearing on defendant's motion to quash the search warrant, Officers Pates and Jamison testified that they searched the defendant's apartment in 1966 or 1967. On this occasion nothing was seized and no arrests were made. Pates testified that he normallly places the warrant in a basket in the office of the narcotics unit. It is then logged in a book and sent to court. Jamison testified that if no contraband is found in a search, a miscellaneous incident card is filled out and attached to the warrant before it is submitted to the office. Then all warrants are filed with the clerk of the municipal court.

Lieutenant Kernan, commanding officer of the narcotic section during the years of 1966 and 1967, testified that Pates and Jamison conducted the second search of defendant's apartment on February 13, 1967, pursuant to a search warrant. The miscellaneous incident card was introduced, but Kernan could not locate the warrant that had been used. According to his records, no other searches of defendant's apartment were made.

Mrs. Price, wife of the defendant, testified that the police searched the apartment on five or six occasions subsequent to her husband's arrest. She was shown a search warrant on these occasions, but was not given a copy.

Arthur Crowe, a circuit court deputy clerk, testified that he receives the search warrants after they have been executed, but never before they are executed.

Defendant argues that section 108—4 allows the police to secure an unlimited number of search warrants because the warrants are not docketed until the warrant has been executed or has been returned "not executed." According to the Committee Comments (S. H. A. ch. 38, § 108—4, p. 124), this section was included to "end the needless requirement of the use of seals in issuing warrants and, secondly, to enhance the law enforcement process by providing for a lack of public knowledge concerning the warrant until it has been executed." The fact that the warrants are not filed until after execution or attempted execution does not give unlimited power to the police. Section 108—3 of the Code of Criminal Procedure requires that, before a search warrant can be issued, a written complaint stating facts which show probable cause must be submitted to the judge. In addition, the complaint must describe the place and/or person to be searched, and the things to be seized. The police cannot obtain a warrant without first meeting the requirements of this section.

Defendant further argues that section 108—4 violates the right against unreasonable searches because there was no record of the docketing of the warrant for the February 13 search or for searches which allegedly took place subsequent thereto. If a warrant was not docketed after the February 13 search or after other searches which allegedly took place, this was a clear violation of the mandate of section 108—4. The statute does not abridge a constitutional right; on the contrary it protects the right against unrecorded searches. The fact that the statute may have been violated is not a ground for declaring it unconstitutional. If the statute was so violated, it is not a departure from basic standards to re-

mand those aggrieved persons to the remedies of private action and such protection as the internal discipline of the police under the eyes of an alert public opinion may afford. See *Wolf* v. *Colorado,* 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359.

Defendant next contends that the search warrant was void because it was issued pursuant to an affidavit signed with a fictitious name. We have today disposed of a like contention in *People* v. *O'Kiersey,* No. 41438, and the circumstances here are the same.

Defendant finally contends that the warrant may be voided if the allegations in the complaint for the warrant are specifically denied under oath. In *People* v. *Bak,* 45 Ill. 2d 140, and *People* v. *Mitchell,* 45 Ill. 2d 148, this court determined that "both constitutions contemplate only that a judicial officer find probable cause for the issuance of a warrant based on the evidence under oath that has been presented to him by the one requesting the warrant. It is contemplated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the integrity which is contemplated by the *ex parte* proceeding and intentionally make misrepresentations to the judicial officer, he can be punished for the offense." (45 Ill. 2d at 144.) We believe that the allegations in the complaint were sufficient to show probable cause and to justify the issuance of the warrant.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX C

Dockets Nos. 41151 and 41313 cons. —— agenda p. —
January, 1969

The People of the State of Illinois, Appellee, vs. John S. Bak, Appellant.—*In re* People *ex rel.* John J. Stamos, Appellee, vs. 1964 Cadillac, Appellant.

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

Defendant, John S. Bak, was convicted of gambling in the circuit court of Cook County and fined $250. In a companion case his automobile was declared forfeited and ordered sold for having been used by defendant in the commission of the gambling offense. The two cases have been consolidated for appeal, and the sole question involved is the extent of the constitutional right of defendant to contest the validity of the search warrant leading to his arrest and the seizure of his automobile.

The complaint was filed by a policeman seeking a warrant to search the person of defendant and his car which was specifically described and registered to defendant at a certain tavern known as The Pub. The objects to be seized were particularly described. The affidavit further recited that a reliable informant gave the affiant information relative to horse-race gambling taking place at the Pub; that the informant had given reliable information on two previous occasions; that informant had placed bets at the Pub in a rear room screened from the tavern proper by a wall of beer cases. Affiant further stated that on two occasions he personally observed a number of persons walk behind the wall of beer cases and leave from the rear door; that on another occasion he observed a

person reading a racing form in the tavern and after making notes he walked to the rear and out the rear door; that he saw informant do likewise and later informant told him he had placed a bet. The last sentence of the affidavit recited that the informant stated that defendant was the party who picked up the bets and that the car mentioned was the one he uses.

On motion to suppress and again at the trial defendant requested a hearing for the purpose of proving that the informer was not reliable and that other allegations of the affiant were not true. He offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but no convictions; that affiant had misrepresented the physical appearance of the tavern which could be proved by pictures and witnesses; that there was no rear room but rather another entrance to another street which entrance was not visible from the bar from where affiant said he observed people entering and leaving said entrance; that the informer never had any contact with the defendant and his car; and finally, that the only paragraph mentioning defendant was the last one in the complaint which obviously was typed by a different typewriter and may have been added after the execution of the warrant.

The trial court denied the motion to suppress and the right to a hearing on the grounds that the warrant was sufficient on its face and defendant was not entitled to a hearing to look behind the warrant and affidavit. Defendant did not testify at the trial and the State proved that after serving the warrant defendant was arrested in his car and gambling paraphernalia was found on his person and in his car. Later in the forfeiture trial the motion to suppress was again denied although some of the evidence offered by defendant was heard by the court.

Defendant contends that he has a constitutional right to look behind a search warrant which is valid on its face and to present evidence challenging the truthfulness of the allegations of fact on which the warrant was issued. The State contends that the issuance of a warrant is a conclusive judicial finding of the existence of probable cause and any subsequent hearing is limited to an examination of the face of the complaint and warrant.

The question posed is a difficult one which in Illinois has not been fully discussed or explicitly decided. In other States and in the Federal courts the decisions are in conflict, both points of view being represented. (See 5 A.L.R. 2d 394.) The answer lies in an analysis of the constitutional right itself, a restatement of the meaning of probable cause and an understanding that the existence of probable cause is a judicial determination.

The fourth amendment to the constitution of the United States and section 6 of article II of the Illinois constitution are practically identical in prohibiting unreasonable searches and seizures and providing that no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized. Likewise the standards for issuance of warrants are the same for both Federal and State authorities. (*Aguilar* v. *Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.) And we have held that the two constitutional provisions are to be construed alike. *People* v. *Grod,* 385 Ill. 584.

Probable cause is defined as having information which would justify a reasonably prudent person in believing that a crime has been or is being committed, and that evidence thereof is contained on the premises. The sub-

stance of the definition is a reasonable ground for belief in guilt, *ie.* whether the facts and circumstances within the knowledge of the affiant, and of which he had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that the law was being violated. *Carroll* v. *United States,* 267 U.S. 132, 69 L. Ed. 543, 145 S. Ct. 280.

As is apparent from the definition it is the judgment of the issuing magistrate, not that of the affiant, that is controlling. As stated in *Johnson* v. *United States,* 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367, the protection of the constitutional provision lies in the requirement that the conclusions and inferences arising from the allegations of the affiant are to be made "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime." Though the affidavit may be based upon hearsay from an informer, nonetheless, to enable a magistrate to make this judgment it necessarily follows that he must be furnished with some of the underlying circumstances upon which the affiant based his allegations concerning the reliability of the informer; otherwise the function of the magistrate would be that of a mere rubber stamp for the affiant. (*Aguilar* v. *Texas,* 378 U.S. 108, 12 L. Ed 2d 723, 84 S. Ct. 1509.) If the allegations are based on personal observation it must be so stated with the time and place specifically set forth and the issuing magistrate must assess independently the claimed showing of probable cause that is brought before him. *Giordenello* v. *United States,* 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245.

From these rules it follows logically that factual showing sufficient to support a finding of probable cause by a

magistrate must be a truthful showing. To hold otherwise would be incongruous, for untruths are not facts. To deny a defendant the right to disclose perjury or misrepresentation would not only deprive him of his constitutional right but in effect it would make a mockery of the very procedure established to protect that right.

This right to a hearing, under appropriate circumstances, has been determined by recent decisions in the Federal courts. The Supreme Court in *Rugendorf* v. *United States,* 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, stated that it has never passed directly on the extent to which a court may permit such an examination. However, it did not dispute, or at least it left open, the question of under what circumstances the right might be exercised, stating that the facts then before it were "of only peripheral relevance to the showing of probable cause, and * * * did not go to the integrity of the affidavit." In *United States* v. *Gillette* (2d cir.), 383 F. 2d 843, the court stated that "in appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face." To like effect is *United States* v. *Suarez* (2d cir.), 830 F. 2d 713, wherein the court stated that it may be that testimony at trial could so clearly demolish statements in an affidavit supporting the warrant, that a prior denial of a motion to suppress would be overridden. In *Gillette* it was held that the issue had not been properly raised by defendant's attorney and there was no factual issue to be resolved. In *Suarez* defendant failed to request a hearing and even so the court found that evidence was properly heard though it fell far short of controverting statements in the affidavit. In *Chin Kay* v. *United States* (4th cir.), 311 F. 2d 398, it was acknowl-

edged that under proper circumstances a defendant may be able to challenge the veracity of recitals of "previous reliability" by a motion to suppress. In *King* v. *United States* (4th cir.). 282 F. 2d 398, the court stated that at least in Federal courts the rule is that false information given by the affiant will vitiate the warrant and search. In *United States* v. *Pearce* (7th cir.), 275 F. 2d 318, the lower court heard extensive evidence on the question whether affiant had personal knowledge of the matters alleged in the affidavit, and on appeal it was held that the propriety of such a hearing was hardly open to question. In *United States* v. *Roth* (7th cir. 1967), 391 F. 2d 507, 509, the court held that a trial court may not use evidence adduced at a subsequent hearing on a motion to suppress to validate an otherwise defective affidavit. "But if the hearing discloses matters which discredit or impeach the assertions in the affidavit, these must be considered by the trial court in determining whether probable cause in fact existed."

Other cases have considered the circumstances and conditions under which a defendant should be entitled to a hearing. In *People* v. *Alfinito,* 16 N.Y. 2d 181, 211 N.E. 2d 644, the affidavit alleged that an informant had placed bets with defendant and that the police officer (affiant) had personally observed defendant at the same premises exchanging slips of paper and money with a number of persons. At the hearing on the motion to suppress, defendant's wife and another witness testified that defendant was not present at the apartment on any of the occasions mentioned in the affidavit. After a hearing the lower court granted the motion, stating that the sharp conflict in the testimony created a doubt which must be resolved in favor of defendant. The appellate court recognized the right of the defendant to question

the veracity of the affiant, stating that, "Modern thought which produced the decision in *Mapp* v. *Ohio,* 367 U.S. 643, [6 L. Ed. 2d 1081,] 81 S. Ct. 1684, would make incongruous any holding that a search warrant is beyond attack even on the proof that the allegations on which it was based were perjured." The court then expressly rejected the import of the lower court's ruling that whenever there is sworn testimony disputing the basic allegations of the affidavit the warrant must be quashed. Instead it endeavored to establish a rule which would prevent such a violation of a person's right and at the same time avoid creating a situation where overstrict rules would invalidate numerous warrants simply because witnesses could later be found to swear to the opposite of what the officer swore when he procured the warrant. It concluded that an inquiry as to the truthfulness of affiant should be permitted, that the burden of proof was on the person attacking the warrant and that any fair doubt arising from the testimony as to truthfulness of affiant's allegations should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing the warrant.

In *United States* v. *Halsey* (S.D.N.Y.), 257 F. Supp. 1002, the court reviewed the question at length and approved the rule in *Alfinito,* but only "where there is an initial showing of some sort [illegible] suggestion of a basis or area of doubt—is tender[illegible]t emphasized, however, that as in the case under consideration, a defendant is not entitled to a hearing on a "mere bland and sweeping claim for a right to try affiant in every case, with no foundation beyond the hope that some inaccuracy or falsehood may emerge."

In *O'Bean* v. *State* (Miss.), 184 So. 2d 635, it was held that the mere issuance of a warrant does not constitute such a conclusive judicial finding of probable cause so as to preclude further inquiry pursuant to appropriate pleading; and a previous decision to the contrary was expressly overruled.

In California a similar result is reached based on the Penal Code which provides for a hearing if grounds for the issuance of the warrant are controverted. (*People* v. *Butler*, 415 P. 2d 819, 52 Cal. Rptr. 4.) Our Code of Criminal Procedure, (Ill. Rev. Stat., 1967, ch. 38, par. 114—12(b)) likewise sets forth the procedure to be followed in seeking a suppression of unlawfully obtained evidence: "The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant."

We agree with the principles contained in the cases above cited and we conclude that the circumstances presented by the facts before us entitle defendant to a hearing for the purpose of controverting the allegations of the affidavit. We likewise find that the section of the Code of Criminal Procedure above quoted contemplates such a hearing where the truth of the allegations supporting the warrant are seriously challenged. As stated in *United States* v *Halsey*, 257 F. Supp. 1002, we do not intend that our decision here shall be authority for an indiscriminate or blind attack upon every affidavit in the hope that some inaccuracy may be revealed. Rather, we hold that a challenge to the truthfulness of the allegations of an affidavit supporting a warrant raises an is-

sue of fact necessary to be determined in a hearing for that purpose, when appropriately pleaded with an offer of proof warranting a reasonable conclusion that the challenge has merit.

The State has cited *People* v. *Alvis,* 342 Ill. 460, as authority for the proposition that a warrant valid on its face may not be challenged by extraneous evidence. We believe that the facts in the case before us are distinguishable, but to the extent that they are not that decision is expressly overruled.

We therefore conclude that case No. 41151 involving the gambling charge against defendant, John S. Bak, and case No. 41315 involving the forfeiture of defendant's automobile are both reversed and the causes remanded for new trials, with directions that a hearing first be held on defendant's motion to suppress.

Reversed and remanded, with directions.

Mr. JUSTICE HOUSE, dissenting:

It is not entirely clear whether the holding in the majority opinion is based on a right it finds in the fourth amendment to the Federal constitution and section 6 of article II of our constitution or section 114—12(b) of the Code of Criminal Procedure. (Ill. Rev. Stat., 1967, ch. 38, par. 114—12.) In my opinion, however, a defendant has neither a constitutional nor a statutory right to go behind a search warrant which is valid on its face and is supported by an affidavit showing probable cause. That was the rule in this State prior to this decision, (*People* v. *Alvis,* 342 Ill. 460), and is the rule in most jurisdictions that have considered the question. See 5 A.L.R. 2d 394.

While not completely analogous, there are strong similarities between the presentment of an indictment by a grand jury and the issuance of a search warrant by a court. Both have a constitutional basis designed to protect the rights of our citizens against arbitrary and oppressive action by the government; both are *ex parte* proceedings; both the grand jury and court issuing a warrant may act on hearsay evidence and both act on probabilities which will later be tested for certainty—in the one case by a formal trial and in the other by execution of the warrant.

Although the Supreme Court has not decided whether, or the extent to which; a defendant may question the truthfulness of the allegations of an affidavit showing "probable cause" for the issuance of a search warrant, (see *Rugendorf* v. *United States,* 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825), it has decided that "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits" and defendants are not, therefore, entitled "to challenge indictments on the ground that they are not supported by adequate or competent evidence." (*Costello* v. *United States,* 350 U.S. 359, 363-364, 100 L. Ed. 397, 402, 403, 76 S. Ct. 406, 409; see also *Lawn* v. *United States,* 355 U.S. 339, 2 L. Ed. 2d 321, 78 S. Ct. 311, and *United States* v. *Blue,* 384 U.S. 251, 16 L. Ed. 2d 510, 86 S. Ct. 1416, concerning illegally-obtained evidence before the grand jury.) Our court has followed this holding. *People* v. *Jones,* 19 Ill. 2d 37.

The policy considerations which militate against defendant being able to challenge an indictment on the ground that it is not supported by adequate or competent evidence also militate against his disputing matters

stated in an affidavit supporting a search warrant. That the right to controvert such an affidavit may deter illegal searches is not alone sufficient. The Supreme Court has pointed out that while the aim of the exclusionary rule is the deterrence of illegal searches, none of its decisions "hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman* v. *United States,* —— U.S. ——, 22 L. Ed. 2d 176, 187, 89 S. Ct. 961, 967.

It would seem to me that if a defendant can be put in jeopardy and on trial for a felony without an opportunity to challenge the adequacy or competency of the evidence upon which the indictment is based; then a person or his premises may be searched pursuant to a warrant, valid on its face and supported by an affidavit showing probable cause, without an opportunity to dispute the matters stated in the affidavit. An adversary proceeding to determine whether there was in fact probable cause for the issuance of a search warrant is neither required or contemplated by the constitution.

The majority opinion states that recent Federal decisions support its position. The Federal cases cited stand simply for the proposition that the question has not been decided. *Rugendorf* v. *United States,* 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, of course left the issue undecided.

United States v. *Gillette* (2d cir.) 383 F. 2d 843, is quoted by the majority as follows: "in appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face." The fuller quote is "we by no means foreclose the possibility that, in appropriate circumstances, a hearing should be held to establish the verac-

ity of sworn allegations in an affidavit which is adequate on its face. * * * The case at hand, however, does not present such circumstances." (383 F. 2d 843, 849.) The position taken by the court in *Gillette*, therefore, was simply that taken by the Supreme Court in *Rugendorf*. It left the issue undecided.

The majority also cites *United States* v. *Suarez* (2d cir.), 380 F. 2d 713, as standing for the proposition it attributes to *Gillette*. The court, however, in *Suarez* stated: "When, if ever, and to what extent a defendant can test the truth of assertions in an affidavit submitted to obtain a search warrant are difficult questions. They were specifically held open in *Rugendorf* v. *United States*, 376 U.S. at 531-532, 84 S. Ct. 825, 11 L. Ed. 2d 887, and have not been explicitly decided or fully discussed by this court." 380 F. 2d 713, 715.

My reading of the Federal cases is that none of them has squarely held that the allegations in an affidavit supporting a search warrant may be controverted. A reading of the State case cited by the majority shows that none of them has held that a defendant has a constitutional right to controvert the allegations of a supporting affidavit.

O'Bean v. *State* (Miss.) 184 So. 2d 635, does, as the majority states, hold "That the mere issuance of a warrant does not constitute such a conclusive judicial finding of probable cause or as to preclude further inquiry pursuant to appropriate pleading; and a previous decision to the contrary was expressly overruled." Citing this decision, however, for the proposition that the averments in an affidavit may be controverted is a complete misapprehension of the Mississippi case.

Prior to *O'Bean* the Mississippi rule was that the issuance of the warrant is a conclusive judicial finding of the magistrate of the existence of probable cause. The Mississippi court recognized, however, that after *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, the rulings of the Supreme Court on search and seizure were applicable to the States. It also recognized that in *Aguilar* v. *State of Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, the Supreme Court held that on a motion to suppress evidence, the affidavit in support of the warrant may be examined to see if it shows the existence of probable cause on its face. Thus, *O'Bean* only stands for the proposition that an affidavit in support of a warrant must show probable cause on its face.

The New York case (*People* v. *Alfinito,* 16 N.Y. 2d 181, 211 N.E. 2d 644) and the California case (*People* v. *Butler,* 415 P. 2d 819, 52 Cal. Rptr. 4,) cited in the majority opinion both allow the averments of the affidavit to be controverted as matter of statutory right under the particular wording of their respective statutes. In my opinion, however, our statute governing motions to suppress evidence does not give a defendant such a right.

Section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, ch. 38, par. 114—12) authorizes a motion to suppress on the ground that "there was not probable cause for the issuance of the warrant" and provides that "The judge shall receive evidence on any issue of fact necessary to determine the motion * * *." The majority feel that this authorizes an adversary proceeding to determine probable cause. I cannot agree.

The trouble with this conclusion is that it assumes the very thing we are called upon to decide. If the allegations of an affidavit can be controverted, probable cause

is an issue of fact and the defendant may introduce evidence on the issue, if, on the other hand, the allegations of an affidavit cannot be controverted, then probable cause is a question of law to be determined from the face of the affidavit and it is not necessary for the judge to receive evidence. Thus, simply because a motion to suppress evidence obtained with a warrant may be based on ground that "there was not probable cause for the issuance of the warrant' and the "judge shall receive evidence on any issue of fact" does not make the issue of probable cause a question of fact.

The commimttee comments to section 114—12 point out that "This section provides the pre-trial procedure for enforcing the constitutional protection against illegal searches and seizures as found in the Illinois Constitution, Art. 11, Section 6, and the United States Constitution, 14th Amendment which applies to the states since *Mapp* v. *Ohio.*" It is apparent, therefore, that our legislature did not intend to create any new statutory right but was merely providing the procedure for carrying out the constitutional right against unreasonable searches and seizures. The guide to interpreting this section is what is required by the constitution. My reading of the Federal cases and cases from other State jurisdictions fails to reveal where any of them has held that a defendant has a constitutional right to controvert the allegations of the affidavit; and if our statute was intended to create such a right, it is strange that the committee comments to section 114—12 failed to mention it and that none of the law review articles have mentioned it. See *e.g.*, La Fave, Search and Seizure: "The Course Of True Law * * * Has Not * * * Run Smooth," 1966 Ill. L.F. 255.

What makes this case even more perplexing is that it goes beyond all the cases it cites in support of the rule it lays down. The dicta from the Federal cases indicate that if the Federal courts were to apply such a rule, it would only be where the affiant had intentionally misled the magistrate into finding probable cause.

For example, the Supreme Court in *Rugendorf* stated: "This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit established 'probable cause'; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid. * * * The factual inaccuracies depended upon by petitioner to destroy probable cause * * * were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." (376 U.S. 528, 531-532, 11 L. Ed. 2d 887, 891, 84 S. Ct. 825, 827-828.) The court further stated: "Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant, they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." 376 U.S. 528, 533, 11 L. Ed. 2d 887, 892, 84 S. Ct. 825, 828.

The New York Court in *Alfinito* construed its statute in such a manner as to only allow the allegations of the affidavit to be controverted to show perjury of the affiant.

The majority does not limit the rule it lays down to a showing of perjury, bad faith or intentional misrepresentation by the affiant in securing the warrant, but it

permits a full adversary proceeding when the truthfulness of the allegations in an affidavit is challenged.

This new rule announced by the majority leads me to the inescapable conclusion that Mr. Justice Black was correct when he said: "It is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of the guilty is desirable, other things being equal. One commentator, who attempted in vain to dissuade this Court from today's holding, thought it necessary to point out that there is 'a strong public interest in convicting the guilty.' Indeed the day may soon come when the ever-cautious law reviews will actually be forced to offer the timid and uncertain contention, recently suggested sairically, that 'crime may be thought socially undesirable, and its control a "valid governmental objective" to which the criminal law is "rationally related".'" *Kauffman* v. *United States,* ——, U.S. ——, 89 S. Ct. 1068, 1081 (dissenting).

Mr. JUSTICE UNDERWOOD, also dissenting:

I concur with and join in Mr. Justice House's dissent.

The policy of the fourth amendment is to prohibit unreasonable intrusions into the privacy of the individual. Whether there existed a necessity for the intrusion has always been reviewable under the test of probable cause. Intrusions authorized by warrant have always been preferred to warrantless intrusions because "the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests." (*United States* v. *Lefkowitz,* 285 U.S. 452, 464, 76 L. Ed. 877, 882, 42 S. Ct. 420, 423.) It is not surprising then that courts have been prone to sustain searches made under the authority of a warrant even though a

warrantless search based upon the same evidence would have been condemned. (*United States* v. *Ventresca,* 830 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741, 746; *Aguilar* v. *Texas,* 378 U.S. 108, 11-11, 12 L. Ed. 2d 723, 726, 84 S. Ct. 1509; 1512; *Jones* v. *United States,* 362 U.S. 257, 270, 4 L. Ed. 2d 697, 707, 80 S. Ct. 725, 735.

It is clear that the generally prevailing view has been, and was in this State prior to this opinion, that the sufficiency of a complaint for a search warrant was tested by its contents and those alone. The facts stated in the affidavit, together with such other evidence as might have been presented to the issuing judge, either were or were not sufficient to establish probable cause for the issuance of the warrant. In *Aguilar* (378 U.S. at 109 n. 1, 12 L. Ed. 2d at 725 n. 1, 84 S. Ct. at 1511 n. 1) the United States Supreme Court stated: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention," citing *Giordenello* v. *United States,* 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245, wherein the court ignored evidence not brought to the attention of the magistrate issuing the warrant. (See *Spinelli* v. *United States,* —— U.S. ——, 21 L. Ed. 2d 637, 89 S. Ct. 584, 587, n. 3.) In these cases the State has been precluded from presenting additional information to sustain a showing of probable cause.

Likewise the defendant has been precluded from attacking the veracity of the sworn allegations in an affidavit which is adequate on its face. *Kenney* v. *United States,* (D.C. cir.), 157 F. 2d 442; *United States* v. *Gianarsi,* (D.D.C.), 25 R.F.D. 194; *Tucker* v *State,* 244 Md. 488, 224 A. 2d 111, *Mattingly* v. *Commonwealth,* 310 Ky. 561, 221 S.W. 2d 82; *Owens* v. *State,* 217 Tenn. 544, 399 S.W. 2d 507; *Hernandez* v. *State,* (Tex. Crim. App.), 255 S.W. 2d 219; *Griffey* v. *State,* (Tex. Crim. App.), 327

APPENDIX D

Docket Nos. 41463, 41464, cons.—Agenda 8—March, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* BARBARA MITCHELL *et al.*, Appellants.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

Separate appeals by the defendants, Barbara Mitchell and Albert A. Wyatt, from judgments of conviction entered in the circuit court of Cook County have been consolidated. Each defendant was indicted for the offense of knowingly owning or possessing instruments and apparatus by means of which bets and wagers were made, recorded, and registered, in violation of section 28—1 (a) (5) of the Criminal Code. (Ill. Rev. Stat. 1965, ch. 38, par. 28—1(a)(5).) While the convictions were based upon separate occurrences, the facts in the two cases are similar and the legal issues presented are identical.

In each case incriminating evidence was seized by police officers acting under search warrants that had been issued on affidavits which, in the respects here involved, were substantially identical. In each case the defendant moved to suppress the evidence that had been seized, on the ground that there was not probable cause for the issuance of the warrant. Evidence was received, and the motion was denied. Each case was then submitted on a stipulation that the evidence heard upon the motion to suppress would be the evidence upon the trial, and each defendant was found guilty.

The State has contended that upon a motion to suppress the defendant may not "go beyond the four corners of

the warrant for the purpose of controverting the matters contained in the affidavit." Apart from constitutional considerations, however, the contention is rebutted by the explicit language of the statute, which authorizes such a motion upon the ground that "there was not probable cause for the issuance of the warrant" and provides that "The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant." (Ill. Rev. Stat. 1967, ch. 38, par. 114—12; see also *People* v. *Bak*, Nos. 41151, 41315 cons., —— Ill. 2d ——; *People* v. *Clifton*, No. 41608, —— Ill. 2d ——.) The question for decision, therefore, is whether the defendants have met their statutory burden.

In each of these cases the search warrant was issued upon the affidavit of a police officer who stated that he had received information from a reliable informer whose previous disclosures had led to a number of arrests or convictions; that the informer had identified a telephone number which he said he called to place bets, and that the telephone company had supplied the name and address of the subscriber of the designated number, which address was set out in the affidavit. Each affidavit then stated that the affiant dialed the number, handed the telephone to the informer, and that the affiant heard the informer place one or more bets on named horses in specified races. Each affidavit stated that the informer said that when he was handed the telephone it was answered by a person unknown to him, with whom he placed his bets. The affidavits stated that the informer said that after the bets were placed, their unknown recipient inquired whether that was all, and the affiant stated that he heard the informer say, "I may call you later," or "That's all for now," or make some similar response.

The defendant Mitchell testified that she had not received a telephone call in which a $5 bet was placed on Latin Liner to win in the first race at Hawthorne, as specified in the affidavit; that she had not been previously arrested and had not ever accepted a bet on a horse. She also testified that a bookmaker with whom she had placed bets was in her apartment when the polic entered and that he attempted to leave by the back door of her apartment as the officers were entering the front door. An officer testified that the only other person present in her apartment was an old man who was not arrested. The officer whose affidavit had led to the search of her apartment testified that the informer did not give him the name of the person who answered the phone, although the officer had asked for this information. The officer did not ask nor was he told where the informer had paid or collected previous bets placed through Mitchell's number. In the search of Mitchell's apartment, records were seized which recorded bets on races before and after the race on which the informer said that he had placed his bets, but no record of that bet was found.

The defendant Wyatt was indicted on two separate counts which arose out of the seizure of evidence on two occasions. One search occurred at 6752 East End Avenue on September 26, 1966, and the other at 740 West 58th Street on September 8, 1966. Wyatt testified that on neither date had he received the bet described in the affidavits. The officer upon whose affidavit the warrant for the search of the East End Avenue apartment was issued testified that the informer did not disclose the name of the person who received the bet. He testified that the informer said that he paid and collected his bets at a tavern, but the officer had not made a record of the

location of the tavern and could not remember it. The gambling records seized at the East End Avenue address did not include the bet alleged to have been placed by the informer.

The officer who prepared the affidavit on which the warrant for the search of the West 58th Street apartment was issued testified that the same informer was used and that he was not able to identify the person with whom he spoke when he placed the bet described in the affidavit. In this case, as in the others, there was no record of such a bet among the records seized, nor did the informer identify the place at which he paid his bets and collected his winnings.

Attached to the motions to suppress in these cases were approximately thirty affidavits which had been used to secure warrants in previous cases. All were similar in form to those here involved. The three officers upon whose affidavits the warrants involved here were issued testified that they had prepared approximately 100 affidavits which contained statements similar to those used here. In none of them was the recipient of the telephone bet identified. The officers testified that the identical procedures were used in all cases in telephoning the bet to the suspected number; the officer dialed the number and handed the phone to the informer.

The affidavits upon which the warrants in these cases were issued are based almost entirely on hearsay; in each case the affiant's participation is limited to dialing the suspected number and listening to the informer's portion of an alleged conversation. Following the decision of the Supreme Court of the United States in *Jones* v. *United States* (1960), 362 U.S. 257, at 272, 4 L. Ed. 2d 697, 708,

80 S. Ct. 725, we stated in *People* v. *Jackson,* 22 Ill. 2d 382, 387, that "hearsay may be used to establish probable cause for a warrant, so long as there is a substantial basis for crediting the hearsay." We have adhered to that statement in subsequent cases. *People* v. *York,* 29 Ill. 2d 68, 70; *People* v. *Williams,* 27 Ill. 2d 542; see also *United States* v. *Ventresca,* 380 U.S. 102, at 108, 13 L. Ed. 2d 684, 85 S. Ct. 741.

In the cases before us, several circumstances combine to discount substantially the credibility of the statements of the undisclosed informer. In each case, the informer was unable to identify the person with whom he spoke over the telephone, even though he had placed the bet on credit and had used the number for prior betting transactions. The incongruous nature of this circumstance is underscored by the lack of official interest in other aspects of the gambling operations of the defendants, such as the location of outlets for collection and payment, and the identity of those who collected and paid. Moreover, if we accept the fact that a particular number was dialed and that the affiant heard the informer speak into the instrument, that fact does not establish either that the telephone was answered or that the person who answered it accepted a bet. Although the inference that the call was completed and the proffered bet accepted normally would require slight corroboration, in these cases there is none. To the contrary, the searches took place shortly after the telephone conversations and the fact that no records of the bets alleged to have been made were found, when records of other bets appeared to have been regularly kept, necessarily raises substantial doubts. At crucial stages in the development of the case for probable cause, that which would normally be as-

sumed to follow—the informer's knowledge of the identity of the person with whom he had placed the bet, and a record of the bet supposedly placed—is affirmatively shown to be absent. When the hearsay information supplied by the informer is appropriately discounted, what remains falls short of probable cause and the motions to suppress should have been granted.

The judgments of the circuit court of Cook County are reversed.

Judgments reversed.

MR. JUSTICE HOUSE, dissenting:

The trial court in this case has been reversed because the majority feel that there was not substantial basis for crediting the hearsay upon which "probable cause" for issuance of the warrant was based. While rejecting the contention of the People that the averments of the affidavit may not be controverted, the result reached by the majority with the exception of one deficiency (to credit the hearsay) could have been reached by an examination of the face of the affidavit. If the deficiencies found by the majority in the case are necessary to credit the hearsay establishing probable cause, then they should be in the affidavit. The one deficiency which the majority says tends to discredit probable cause and which could not be put in the affidavit is the fact that the informer's bet was not recorded. If this fact, which could only be established after the search, is permitted to discredit the hearsay, it would seem that the fact that gambling equipment was found should be allowed to credit the hearsay.

Unlike *People* v. *Bak*, Nos. 41151 and 41315, the majority this time relies solely on its interpretation of section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, ch. 38, par. 114—12) to allow a defendant to controvert the averments of the affidavit. "Apart from constitutional considerations, however, this contention is rebutted by the explicit language of the statute, which authorizes such a motion upon the ground that 'there was not probable cause for the issuance of the warrant' and provides that 'The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant.'"

To say that the statute is "explicit" is a bootstrap argument because it assumes the very issue to be decided by this court. The People argue that on a motion to suppress the defendant may not "go beyond the four corners of the warrant for the purpose of controverting the matters contained in the affidavit." If this be true, then whether there was "probable cause" is a question of law and it is not necessary for the judge to receive evidence "on any issue of fact." If, however, the averments of the affidavit may be controverted, then whether there was "probable cause" is a question of fact and the judge may receive evidence on that question of fact in order "to determine the motion."

As pointed out in the dissenting opinion in *Bak*, the intent of the legislature in enacting section 114—12 was to provide the pretrial procedure for enforcing the constitutional right against unreasonable search and seizure. Thus, the statutory right under section 114—12 is coextensive with the constitutional right and it does not

enlarge it. As further pointed out in the dissenting opinion to *Bak,* no case has held that a defendant has a constitutional right to controvert the averments of an affidavit; and if such a right were to be applied by the Federal courts, it would be limited to an inquiry of whether the affiant intentionally misled the magistrate. Here the majority reverses the trial court and holds that the incriminating evidence be suppressed, not because of any perjury by the affiant, but simply because it does not believe the hearsay statements of the undisclosed informer.

There seems to be little doubt that this ruling will create a situation where every search warrant which proves fruitful will be attacked on the ground that every statement in the affidavit is wrong except those concerning the incriminating evidence found, because it is a simple matter to find witnesses who will later swear to the opposite of what the affiant swore or the informer said. I feel that the trial court should have been affirmed.

Mr. Justice Underwood, also dissenting:

For the reasons stated by Mr. Justice House and me in *People* v. *Bak,* Nos. 41151, 41513 cons., and by him in this case, I join in his dissent.

Mr. Justice Ward took no part in the consideration or decision of this case.

APPENDIX E

Docket Nos. 41151, 41315 cons.—Agenda 67—November 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* JOHN S. BAK, Appellant.—THE PEOPLE *ex rel.* JOHN J. STAMOS, Appellee, *vs.* 1964 CADILLAC, Appellant.

MR. JUSTICE WARD delivered the opinion of the court:

The defendant, John S. Bak, was convicted in the circuit court of Cook County of the crime of gambling and fined $250. His automobile was declared forfeited in a companion case and ordered sold because it had been used by him in the commission of the gambling offense. The cases have been consolidated for appeal. The question presented is whether the person against whom or against whose property a search warrant has been directed may dispute the matters declared under oath which led to the finding of probable cause and the issuance of a search warrant by the judicial officer.

The complaint was filed by a police officer seeking a warrant to search the person of the defendant and his auto, which was specifically described. The auto was described as registered in the name of the defendant at the address of a tavern called The Pub. The objects to be sought under the warrant were particularly described. The affidavit given by the officer further recited that a reliable informant had given him information that horse-race gambling was taking place at the Pub; that the informant had given reliable information on two previous occasions; that the informant had placed bets at the Pub in a rear room screened from the tavern area by a wall of beer cases. The affiant further declared that on two

occasions he had personally observed a number of persons walk behind the wall of beer cases and leave from the rear door; that on another occasion he had observed a person reading a racing form in the tavern and after making notes the person walked to the rear and then out of the rear door; that he had seen the informant do likewise and that the informant later told the affiant that he had placed a bet in the rear of the tavern. The affidavit recited also that the informant declared that the defendant was the person who picked up bets from the tavern and that the auto described was used for this purpose.

On a motion to suppress and again at trial the defendant requested a hearing for the purpose of proving that the informer was not reliable and that other allegations made by the affiant were not true. He offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but no convictions; that the affidavit had misrepresented the physical appearance of the tavern, which misrepresentations could be proved by photographs and witness; that there was no rear room to the tavern but there was another entrance to the tavern from another street, which entrance was not visible from the part of the bar from which the affiant had made his observations; that the informer never had any contact with the defendant or his car; and, finally, that the only paragraph mentioning the defendant was the last one in the complaint, which obviously had been typed on a different typewriter, and which may have been added after the execution of the search warrant.

The trial court held that the defendant did not have a right to a hearing because the warrant was sufficient on

its face and that the defendant was not entitled to inquire behind the warrant and affidavit. The defendant did not testify at the trial and the State proved that after the warrant had been served the defendant had been arrested in his car and that gambling paraphernalia had been found on his person and in the auto. Later, in the forfeiture trial, another motion to suppress was denied, although some of the evidence offered there by the defendant was heard by the court.

The defendant contends that he has a constitutional right to look behind a search warrant which is valid on its face and to present evidence challenging the truthfulness of the allegations of fact on which the warrant was issued. The State contends that the issuance of a warrant represents a conclusive judicial finding of the existence of probable cause and that any subsequent hearing which may be ordered must be limited to an examination of the face of the complaint and warrant.

It would appear that a majority of the jurisdictions which have considered the question have concluded that matters alleged under oath, upon which a search warrant was issued, may not be disputed by the one against whom or against whose property the warrant has been directed. See, *Kenney* v. *United States,* (D.C. cir.), 157 F. 2d 442; *United States* v. *Gianaris,* (D.D.C.), 25 F.R.D. 194; *Tucker* v. *State,* 244 Md. 488, 224 A. 2d 111; *Mattingly* v. *Commonwealth,* 310 Ky. 561, 221 S.W. 2d 82; *Owens* v. *State,* 217 Tenn. 544, 399 S.W. 2d 507; *Hernandez* v. *State,* 158 Tex. Crim. 296, 255 S.W. 2d 219; *Griffey* v. *State,* 168 Tex. Crim. 338, 327 S.W. 2d 585; Annot. 5 A.L.R. 2d 394.

However, other courts either by holding or by suggestion have favored a contrary view. See, *United States* v. *Suarez* (2d cir.), 380 F. 2d 713; *United States* v. *Gillette*

(2d cir.), 383 F. 2d 843; *United States* v. *Roth* (7th cir.), 391 F. 2d 507; *People* v. *Alfinito*, 16 N.Y. 2d 181, 211 N.E. 2d 644.

The Supreme Court has not yet ruled on the question. In *Rugendorf* v. *United States*, 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, the Court said (376 U.S. at 532, 11 L. Ed. 2d at 891,): "Petitioner attacks the validity of the search warrant. This court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' * * *." This court has not directly considered the issue, but the appellee urges that we follow the majority view, which, it says, was implicitly approved in *People* v. *Alvis*, 342 Ill. 460, 462, and in *People* v. *Elmore*, 16 Ill. 2d 412, 414. In *Alvis* this court, after ruling that probable cause to issue a search warrant appeared from the faces of the affidavit and warrant, said: "It is also contended that the court should have heard evidence to determine the legality of the search warrant. The motion to suppress evidence was based on the illegality of the search warrant. Its legality could be determined by the examination of the affidavit and warrant, and no necessity for the hearing of evidence arose."

Persuasive arguments can be gathered to support either side of the question. The majority of the members of this court prefer the view that the matters declared which caused the search warrant to be issued may not be contested by one subjected to the search.

The fourth amendment to the constitution of the United States and section 6 of article II of the Illinois constitution are practically identical in prohibiting unreasonable searches and seizures and providing that no warrant shall

issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized. Too, the standards for issuance of warrants are the same for both Federal and State authorities. *Aguilar* v. *Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.

This majority of the court believes that both constitutions contemplate only that a judicial officer find probable cause for the issuance of a warrant based on the evidence under oath that has been presented to him by the one requesting the warrant. It is contemplated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence. Should an affiant betray the confidence in his integrity which is contemplated by the *ex parte* proceeding and intentionally make misrepresentations to the judicial officer, he can be punished for the offense. In *People* v. *McGrain*, 38 Ill. 2d 189, 190-191, it was correctly asserted that "the rule [is] that the constitutional guarantee against unreasonable searches and seizures requires that the complaint must state the underlying facts on which the complaint bases his belief with such definiteness that, if the complaint is false, perjury may be assigned upon it." That this and no more are contemplated by the procedure for finding probable cause and issuing search warrants is supported by the expression of the Supreme Court of New Jersey (*State* v. *Burnett*, 42 N.J. 377, 201 A. 2d 39) which the Supreme Court in *McCray* v. *Illinois*, 386 U.S. 300, adopted at p. 307: "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an ap-

plication for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced." 386 U.S. 300, 307, 18 L. Ed. 2d 62, 68, 87 S. Ct. 1056.

The view that probable cause for the issuance of a search warrant is to be tested by the evidence originally presented to the judicial officer and that alone is consistent with holdings that the prosecution is precluded from offering supplemental information to sustain a showing of probable cause. The Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108, 109, 12 L. Ed. 2d 723, 725, n.1, said: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention."

The Supreme Court in *McCray* v. *Illinois*, 386 U.S. 300, recognized the value of informers to law enforcement and assured that their identities under described circumstances need not be disclosed. Were this court to adopt a rule permitting a challenge to the evidence presented to the judicial officer to establish probable cause, it could impair seriously the present protection afforded informers in this area. Cases in which probable cause is established through information provided the affiant officer by an informer are obviously numerous. One can readily suppose contrived situations in which a defendant in these cases, by offering, in a motion to suppress, to contradict or explain what the informer told the police officer, would frame an issue of fact, which could require a hearing and

the production of the informer to testify. The alternative would be for the People to drop the prosecutive proceeding. Too, these supposed situations would not be limited to search warrants based on information provided by informers. Where an affiant was deceased, or otherwise unavailable to answer, if required, a challenge to the sworn to matters he originally presented to the judicial officer, a similar problem could appear.

Too, the view permitting a challenge to the matters on which probable cause was found would often, if not typically, result in one judicial officer originally evaluating the credibility of the affiant and another reassessing it in the later motion to suppress. To illustrate, Rule 41(e) of the Federal Rules of Criminal Procedure requires that motions to suppress be brought before a district court, though many, if not most, search warrants are issued by a United States Commissioner. Thus, the district court could be reassessing the matter of credibility already considered by the Commissioner. The majority of this court consider that successive or split evaluations by different judicial officers of the credibility of the affiant and others originally offering evidence were not contemplated in the search warrant procurement procedure.

We do not find merit in the suggestion that there is statutory authority to dispute the matters on which probable cause was found. Section 114—12 of the Code of Criminal Procedure, (Ill. Rev. Stat. 1967, ch. 38, par. 114—12) provides in part that a ground for the suppression of evidence is that "there was not probable cause for the issuance of the warrant" and that "The judge shall receive evidence on any issue of fact necessary to determine the motion." If it was the legislative intent to declare the right for which the defendant here contends it

certainly has eluded the understanding of the profession in Illinois. No court to our knowledge has so interpreted the statute. The committee comments to the section do not mention such a right and the law reviews and bar journals appear to be in ignorance of it. A comparison with statutes which grant the right make it evident that our legislature would have used clearly appropriate language to declare the right had this been its intention. For example, the California statute, quoted in *People* v. *Butler,* 52 Cal. Rptr. 4, 415 P. 2d 819, reads: "If the grounds on which the warrant was issued be controverted, he [the magistrate] must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in Section 869." The predecessor (former 18 U.S.C.A. 625) to Rule 41 of the Federal Rules of Criminal Procedure in similar language provided: "If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness." Had our legislature intended to declare the right, we consider it would have done so forthrightly, using comparable language. It would not have attempted to do it through oblique suggestion.

Our statute's language is very similar to that of Rule 41(e) of the Federal Rules of Criminal Procedure, and no clear right appears under Rule 41 to dispute the evidence upon which probable cause was based. *Cf Rugendorf* v. *United States,* 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825; 5 A.L.R. 2d 394, 409.

Thus, our majority declines to adopt a rule which it believes would unnecessarily permit a collateral and dis-

tracting evidentiary dispute. Justice Schaefer and Ward consider that the integrity of the judicial process requires that a challenge to evidence be allowed.

The judgments of the circuit court of Cook County are affirmed.

Judgments affirmed.

APPENDIX F

Docket Nos. 41463, 41464, cons.—Agenda 69—November, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* BARBARA MITCHELL *et al.*, Appellants.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

Separate appeals by the defendants, Barbara Mitchell and Albert A. Wyatt, from judgments of conviction entered in the circuit court of Cook County have been consolidated. Each defendant was indicted for the offense of knowingly owning or possessing instruments and apparatus by means of which bets and wagers were made, recorded, and registered, in violation of section 28—1(a)(5) of the Criminal Code. (Ill. Rev. Stat. 1965, ch. 38, par. 28—1(a)(5).) While the convictions were based upon separate occurrences, the facts in the two cases are similar and the legal issues presented are identical.

In each case incriminating evidence was seized by police officers acting under search warrants that had been issued on affidavits which, in the respects here involved, were substantially identical. In each case the defendant moved to suppress the evidence that had been seized, on the ground that there was not probable cause for the issuance of the warrant. Evidence was received, and the motion was denied. Each case was then submitted on a stipulation that the evidence heard upon the motion to suppress would be the evidence upon the trial, and each defendant was found guilty.

In each of these cases the search warrant was issued upon the affidavit of a police officer who stated that he had

received information from a reliable informer whose previous disclosures had led to a number of arrests or convictions; that the informer had identified a telephone number which he said he called to place bets, and that the telephone company had supplied the name and address of the subscriber of the designated number, which address was set out in the affidavit. Each affidavit then stated that the affiant dialed the number, handed the telephone to the informer, and that the affiant heard the informer place one or more bets on named horses in specified races. Each affidavit stated that the informer said that when he was handed the telephone it was answered by a person unknown to him, with whom he placed his bets. The affidavits stated that the informer said that after the bets were placed, their unknown recipient inquired whether that was all, and the affiant stated that he heard the informer say, "I may call you later," or "That's all for now," or make some similar response.

The defendant Mitchell testified that she had not received a telephone call in which a $5 bet was placed on Latin Liner to win in the first race at Hawthorne, as specified in the affidavit; that she had not been previously arrested and had not ever accepted a bet on a horse. She also testified that a bookmaker with whom she had placed bets was in her apartment when the police entered and that he attempted to leave by the back door of her apartment as the officers were entering the front door. An officer testified that the only other person present in her apartment was an old man who was not arrested. The officer whose affidavit had led to the search of her apartment testified that the informer did not give him the name of the person who answered the phone, although the officer had asked for this information. The officer did

not ask nor was he told where the informer had paid or collected previous bets placed through Mitchell's number. In the search of Mitchell's apartment, records were seized which recorded bets on races before and after the race on which the informer said that he had placed his bet, but no record of that bet was found.

The defendant Wyatt was indicted on two separate counts which arose out of the seizure of evidence on two occasions. One search occurred at 6752 East End Avenue on September 26, 1966, and the other at 740 West 58th Street on September 8, 1966. Wyatt testified that on neither date had he received the bet described in the affidavits. The officer upon whose affidavit the warrant for the search of the East End Avenue apartment was issued testified that the informer did not disclose the name of the person who received the bet. He testified that the informer said that he paid and collected his bets at a tavern, but the officer had not made a record of the location of the tavern and could not remember it. The gambling records seized at the East End Avenue address did not include the bet alleged to have been placed by the informer.

The officer who prepared the affidavit on which the warrant for the search of the West 58th Street apartment was issued testified that the informer was used and that he (the informer) was not able to identify the person with whom he spoke when he placed the bet described in the affidavit. In this case, as in the others, there was no record of such a bet among the records seized, nor did the informer identify the place at which he paid his bets and collected his winnings.

Attached to the motions to suppress in these cases were approximately 30 affidavits which had been used to se-

cure warrants in previous cases. All were similar in form to those here involved. The three officers upon whose affidavits the warrants involved here were issued testified that they had prepared approximately 100 affidavits which contained statements similar to those used here. In none of them was the recipient of the telephone bet identified. The officers testified that identical procedures were used in all cases in telephoning the bet to the suspected number: the officer dialed the number and handed the phone to the informer.

Defendants contend that they have the right to controvert the matters declared under oath which occasioned the finding of probable cause and the issuance of a search warrant by a judicial officer in each of their respective cases. We have today, in *People* v. *Bak,* Nos. 41151, 41315 cons. held that no such right obtains, either under the fourth amendment to the United States constitution, section 6 of article II of the Illinois constitution, or under our Code of Criminal Procedure, (see Ill. Rev. Stat. 1967, ch. 38 par. 114—12), and we here expressly adopt the reasoning of that opinion in disposing of this issue.

Defendants next contend that the affidavits used to obtain the search warrants in each case failed to show probable cause and, therefore, the search warrants should have been quashed. The affidavits upon which the warrants in these cases were issued are based almost entirely on hearsay; in each case the affiant's participation is limited to dialing the suspected number and listening to the informer's portion of an alleged conversation. Following the decision of the Supreme Court of the United States in *Jones* v. *United States* (1960), 362 U.S. 257, at 272, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725, we stated in *People* v. *Jackson,* 22 Ill. 2d 382, 387, that "hearsay may be used to

establish probable cause for a warrant, so long as there is a substantial basis for crediting the hearsay." We have adhered to that statement in subsequent cases. *People* v. *York,* 29 Ill. 2d 68, 70; *People* v. *Williams,* 27 Ill. 2d 542; see also *United States* v. *Ventresca,* 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741.

In *Aguilar* v. *Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, the Supreme Court enunciated the criteria upon which search warrants issued on the basis of information supplied by undisclosed informants are to be judged. The court there held that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citation] was 'credible' or his information 'reliable'." (378 U.S. at 114.) Recently, in *Spinelli* v. *United States,* 1969, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, the court reaffirmed this position stating: "The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision." 393 U.S. at 415.

In applying these standards to the warrants before us, we are mindful of the "established propositions" adhered to in *Spinelli,* that "probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause, [citation]; that affidavits of probable cause are tested by much less vigorous standards than those govern-

ing the admissibility of evidence at trial, [citation]; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, [citation]; and that their determination of probable cause should be paid great deference by reviewing courts, [citation]." (393 U.S. at 419.) Accordingly, after thorough review of the warrants in question, we find that they were properly issued on probable cause and subscribe to the standards enumerated in *Aguilar*. Here, the affiants specifically averred that they had received information from a "reliable informant" who had in the past supplied them with information which had proved true, exact and accurate and which resulted in enumerated arrests and convictions. Further, the affiants specifically related the "underlying circumstances" from which the informant concluded that illegal gambling operations were being conducted, *i.e.*, when the informer desired to make a wager on a horse race, he would call a specific telephone number. Too, to the extent that affiants overheard the conversation, albeit one-sided, what they heard (the informer placing the bet and "I may call you later" or "That's all for now") corroborated, to a limited extent, the informer's "tip". Accordingly, after giving due deference to the warrants in question (*United States* v. *Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 689, 85 S. Ct. 741) and after thorough analysis of the "underlying circumstances" (*Aguilar* v. *Texas*, 378 U.S. 108, 114; *Spinelli* v. *United States*, 393 U.S. 410) we conclude that the warrants here issued were based on probable cause.

Finally, defendant Mitchell argues that the State failed in its burden of proving her guilty beyond a reasonable doubt. "It is well established that we will not disturb the findings of the trier of fact and substitute our own con-

clusions unless the proof is so unsatisfactory as to justify a reasonable doubt as to defendant's guilt." (*People* v. *Williams,* 36 Ill. 2d 505, 510.) We are unable to find any such deficiency in the record before us.

The judgments of the circuit court of Cook County are therefore affirmed.

Judgments affirmed.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

MR. JUSTICE SCHAEFER, dissenting:

The fourth amendment to the constitution of the United States provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Section 6 of article II of the constitution of Illinois contains a similar prohibition. The basic question in these cases is whether those constitutional provisions can be interpreted to mean that the existence of the facts relied upon to establish probable cause cannot be controverted once the warrant has issued. If these can be no subsequent inquiry into the truth of those facts, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," is protected only by an unreviewable *ex parte* determination of the lowest officer in the judicial hierarchy. And that determination may be based upon a hearsay report of the statements of an anonymous informer, which would be inadmissible in any judicial proceeding. I cannot bring myself to believe that this is the "probable cause, supported by Oath" required by the fourth amendment.

One of the difficulties in dealing with this area of the law is that most of the cases with which the courts are

concerned involve illegal possession of gambling equipment or narcotics, and the result of the search makes guilt unmistakable. The courts have no way of knowing how many unproductive searches are made upon the basis of false affidavits because those cases do not come before the courts. The constitutional requirement of an oath would seem to imply a remedy, either by civil action or by perjury prosecution, for the victim of a search based upon a false affidavit, but the conclusion of the majority in *McCray* v. *Illinois* (1967), 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056, seems to have eliminated any remedy.

In an atmosphere in which there is widespread concern about narcotics problems it is difficult for a court to enforce constitutional guarantees at the instance of one who is unquestionably guilty. But the constitutional provisions are directed at potential abuses by a tyrannical government and those provisions should not, in my opinion, be so diluted in order to secure convictions in narcotics and gambling cases that they can no longer afford protection against the operations of a Hitler type government. It may be that the constitutional protection is phrased in terms that are considered too sweeping to meet the needs of society today. If so, they should be amended. But it is the responsibility of a court to interpret and apply the constitutional provisions as they exist.

The constitutional question involved in these cases was deliberately left open by the Supreme Court of the United States in *Rugendorf* v. *United States* (1964), 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825. The consideration that weighs most heavily in support of the conclusion reached by the majority in these cases is the desire to

expedite the disposition of criminal cases. But it is a common characteristic of many constitutional guarantees that they impede the prompt disposition of criminal cases. Indeed, the constitutional privilege against self-incrimination goes further, and interferes with the ascertainment of the truth. The judicial system is resourceful enough to devise procedures which will prevent abuse of the right to challenge the existence of the facts that were relied upon by the issuing officer to establish probable cause. See *People* v. *Alfinito* (1965), 16 N.Y. 2d 181, 211, N.E. 2d 181, 211 N.E. 2d 644; see also A.L.I. Model Code of Pre-Arraignment Procedure, Tent. Draft No. 3, sec. SS 802, and Reporters' Note.

Apart from constitutional considerations, it seems to me that section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 114—12) clearly provides for a hearing at which the existence of the facts that were relied upon by the issuing officer to establish probable cause may be challenged. The statute states:

> "(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that: * * * (2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; *there was not probable cause for the issuance of the warrant;* or, the warrant was illegally executed.
>
> (b) The motion shall be in writing and state facts showing wherein the search and seizure was unlawful. *The judge shall receive evidence on any issue of fact necessary to determine the motion* and the burden of proving that the search and seizure were unlawful shall be on the defendant." (Emphasis supplied.)

This statute plainly says that evidence is to be received on the question whether there was probable cause for the issuance of the warrant. Since probable cause initially depended on the facts stated in the affidavit upon which the warrant was issued, the statute must mean that upon a motion to suppress, evidence disputing those facts is to be received.

But even if the statute can somehow be construed to mean that evidence may not be received to show the absence of probable cause, I am of the opinion that the guilt of the defendant, Barbara Mitchell, was not established beyond a reasonable doubt. This case was tried upon a stipulation that guilt or innocence should be determined upon the evidence submitted on the motion to suppress. In my opinion that evidence bars a finding of guilty.

Thirty affidavits that had been used to procure warrants in previous cases were presented to the court. These affidavits were all similar to those used in this case. The officers upon whose affidavits the warrants in the present cases were issued testified that they had prepared a hundred similar affidavits, but that in none of those cases did the informant identify the recipient of the bet. The officers who made the affidavits testified that they did not in any of these cases inquire of the informer where he paid his losses or collected his winnings. This testimony shows a massive indifference on the part of the officers to their duty to suppress gambling; it seems to suggest a conscious effort to avoid implicating any higher-ups in organized gambling. It is not necessary that we attempt to arrive at a precise rationalization of these inherently incredible circumstances; their existence, in connection with the wholesale use of "boilerplate" affidavits is enough, in my opinion, to show an absence of probable

cause. The doubts generated by the extraordinary testimony of the officers are reinforced by the fact that while records of other bets were found when the warrant was executed, there was no record of the bet supposed to have been made by the informer. The defendant, Barbara Mitchell, testified that she had never accepted a bet on a horse race. In my opinion her guilt was not proved beyond a reasonable doubt.

APPENDIX G

Docket No. 41438—Agenda 57— May, 1970.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* MARY O'KIERSEY, Appellant.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

Defendant, Mary O'Kiersey, appeals directly to this court from a judgment in the circuit court of Cook County, wherein she was found guilty of possession of marijuana, a narcotic drug, and sentenced to six months probation.

The only question raised in this appeal concerns the validity of the search warrant by which certain incriminating evidence was seized and later used against the defendant at her trial. At the hearing on her motion to quash the search warrant and suppress the evidence, which was denied, it was adduced that the complaint which formed the basis for the issuance of the warrant was sworn to by a person who used a fictitious name. Relying on *United States ex rel. Pugh* v. *Pate* (7th cir. 1968), 401 F. 2d 6, defendant argues that the denial of the motion constituted reversible error.

In *Pugh*, a majority of the Circuit Court of Appeals for the Seventh Circuit held that the use of a fictitious name by an affiant to a search warrant *per se* voided that warrant under the fourth amendment to the United States constitution. Our decisions, however, as noted by Judge Kiley in his dissent in *Pugh*, are to the contrary: "The Illinois Appellate Court rejected Pugh's *per se* contention in *People* v. *Pugh*, 217 N.E. 2d 557; and in *People* v. *Mack*, 12 Ill. 2d 151, 145, N.E. 2d 609 at page 615 the Illinois Supreme Court stated that a fictitious name in

the affidavit for a warrant is not ground for quashing a warrant." 401 F. 2d at 8-9; *cf. People* v. *Smith,* 40 Ill. 2d 501.

In *United States er rel. Smith* v. *Pate* (N.D. Ill. 1969), 305 F. Supp. 225, it was held that because "[t]he *Pugh* decision * * * [did] not affect 'the very integrity of the fact-finding process,' nor * * * avert 'the clear danger of convicting the innocent' * * * [it] should not be retroactively applied." 305 F. Supp at 227; see also to the same effect *United States ex rel. Mayfield* v. *Pate* (N.D. Ill. 1969), 305 F. Supp. 41; see *Desist* v. *United States* (1969), 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030; *Stovall* v .*Denno* (1967), 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967; *Johnson* v. *New Jersey* (1966), 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772; *Linkletter* v. *Walker* (1965), 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731.

The trial of the case at bar took place on January 31, 1968, and the contested search warrant was issued at some time prior thereto. (The exact date of the issuance of the warrant is not contained in the record.) The decision in *Pugh,* however, was rendered on July 1, 1968. Accordingly, inasmuch as the *Pugh* case is to be applied prospectively only, we are not confronted with its effect on the case at bar.

Therefore, our holdings in *People* v. *Mack* and *People* v. *Smith* to the effect that the use of a fictitious name by the affiant to a search warrant does not constitute an abridgment of fourth amendment rights are determinative of the issue before us. We find no error.

The judgment of the circuit court of Cook County is affirmed.

Judgement affirmed.